

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>CHINTAI CHINAPPEN</b>	:	DETERMINATION
	:	DTA NO. 820581
for Revision of a Determination or for Refund of Tax on	:	
Cigarettes and Tobacco Products under Article 20 of the	:	
Tax Law for the Period March 4, 2003.	:	

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Petitioner, Chintai Chinappen, 890 Trinity Ave., Apt. 8D, Bronx, New York 10456-7419, filed a petition for revision of a determination or for refund of tax on cigarettes and tobacco products under Article 20 of the Tax Law for the period March 4, 2003.

On October 17, 2005, the Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (Michelle M. Helm, Esq., of counsel), filed a motion for an order granting summary determination to the Division of Taxation pursuant to sections 3000.5, 3000.9(a)(vi) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the ground that petitioner's pleadings fail to state a cause for relief, and in the alternative, that there are no material issues of fact. Petitioner, appearing by Barbara Lew, Esq., filed no response to the Division of Taxation's motion for summary determination. Accordingly, the 90-day period for issuance of this determination commenced on November 16, 2005.

Upon the motion papers and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

### ***ISSUE***

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner did not state a cause for relief from the Division of Taxation's assertion of a penalty assessment issued to petitioner for possession of unstamped or unlawfully stamped cigarettes, or that such summary determination should be granted inasmuch as there are no material issues of fact concerning the same penalty issue.

### ***FINDINGS OF FACT***

1. The Division of Taxation ("Division") issued a Notice of Determination, dated October 27, 2003, to Chintai Chinappen ("petitioner") which was addressed as follows: "CHINTAI CHINAPPEN, 890 TRINITY AVE APT 8D, BRONX, NY 10456-7419." The notice bore assessment identification number L-023144783-7 and assessed a penalty in the amount of \$60,540.00 for the period March 4, 2003. The notice states: "On 03/04/03, you were found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products. Therefore, penalty is imposed under article 20 of the New York State Tax Law."

2. On June 13, 2005, the Division of Tax Appeals received a petition for an administrative hearing dated June 7, 2005. The envelope containing the petition bore a United States Postal Service ("USPS") postmark of June 8, 2005. The petition stated that "the original notice was not received. The original notice of determination dated 10/27/03 was never received. John Walter has the original unclaimed envelope dated 10/23/03." Attached to the petition was a Response to Taxpayer Inquiry dated September 20, 2004; various letters between petitioner's representative Barbara Lew, Esq., and the Division which were written between January and May 2005; a Notice and Demand for Payment of Tax Due dated February 17, 2004, addressed to petitioner at the same address as in Finding of Fact "1"; a correspondence acknowledgment

notice; a newspaper advertisement; a Power of Attorney from petitioner to Ms. Lew; and correspondence to petitioner from the Division of Tax Appeals with petition forms. In her petition, petitioner asserts that she was confused about the Tax Law concerning untaxed cigarettes, and requests leniency due to her economic situation and lack of education. On August 24, 2005, the Division served an Answer to the petition.

3. In support of its motion for summary determination, the Division submitted: an affidavit of its representative, Michelle M. Helm, Esq.; the affidavit of Paula-Jo Tunkel, an employee of the Division, with attachments; a copy of the Notice of Determination; a copy of petitioner's petition with attachments; the Division's answer to the petition; and a copy of a certificate of indictment from the Supreme Court of the State of New York, Bronx County.

4. The Division submitted a four-page Tax Enforcement Case Tracking System Case History Report detailing the background information of this matter. The report stated, in part, the following:

Case Investigator was informed by Postal Inspectors of eight thousand dollars worth of untaxed cigarettes that had been purchased from TWOWAYSMOKES.COM located at 11326 Farnham Road, Irving, New York. by Chintai Chinappen, Said cigarettes were to be delivered by the U.S. Postal service to 890 Trinity Avenue Apt. 8-D, Bronx, NY 10455 which is the purchasers [sic] home address.

5. Paula-Jo Tunkel is a Tax Technician for the Audit Division of the New York State Department of Taxation and Finance and her responsibilities include review of the files and documentation created in the course of processing cigarette tax assessments, including such documents as investigator's reports and work papers. Ms. Tunkel's affidavit indicated that on March 4, 2003, pursuant to the execution of a search warrant, a Division investigator, Steven

Rivera, found petitioner in possession of 408.6 cartons of untaxed cigarettes, the information used to calculate the subject penalty. In addition, petitioner was arrested on a D felony charge.

6. Petitioner purchased the cigarettes through a company that advertised cigarettes at a lower cost, since they were purportedly bought tax-free through an Indian reservation.

7. Petitioner does not deny that she was in possession of untaxed cigarettes.

### ***CONCLUSIONS OF LAW***

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is arguable (*see, Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *see also, Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879). Summary determination is a drastic remedy and should not be granted if there is any doubt as to the existence of a triable issue (*see, State Bank of Albany v. McAuliffe*, 97 AD2d 607, 467 NYS2d 944, *appeal dismissed* 61 NY2d 758).

Here, petitioner did not respond to the Division's motion; she is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *John Wm. Costello Assoc. v. Standard Metals*, 99 AD2d

227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Tunkel affidavit; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173).

In this case, in order to obtain summary determination in its favor, it is necessary for the Division to show that it provided petitioner with notice of its determination of penalty due in accordance with the law and that petitioner failed to state a cause for relief.

B. Tax Law § 481(1)(b) provides that:

In addition to any other penalty imposed by this article, the commissioner may impose a penalty of not more than one hundred fifty dollars for each two hundred cigarettes, or fraction thereof, in excess of one thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person.

Tax Law § 481(1)(b)(iii) provides, in applicable part, that “[a]ny penalty provided for in this paragraph shall be determined as provided in section four hundred seventy-eight of this chapter, and may be reviewed only pursuant to such section.”

20 NYCRR 79.1[b] provides the following regulatory guidance concerning notices of determination issued pursuant to Article 20:

A notice of determination is given by mailing it to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the application for a license as a cigarette agent or as a wholesaler dealer, at the address reflected in the last return filed by such person or in the event that no application or return has been filed, then at any address of such person as may be obtainable. Any period of time which is measured from the giving of notice by the Department of Taxation and Finance begins to run from the date of mailing of such notice.

The Division must, at the very least, disclose how it determined that the address to which the notice was sent was the address of petitioner in order to comply with the regulation (*Matter of Alawi*, Tax Appeals Tribunal, April 15, 2004).

C. The Division issued the penalty in question to petitioner for possession of untaxed cigarettes pursuant to Tax Law § 481(1)(b). Petitioner does not deny possession or the criminal charges filed against her. Any explanations provided by petitioner as to lack of education, economic status or confusion with the law are without merit. Accordingly, the Division has shown that petitioner has not asserted any cause for relief of the penalty imposed.

D. The Division was informed by the United States postal inspectors that untaxed cigarettes were to be delivered to petitioner's home address at 890 Trinity Avenue, Apt. 8-D, Bronx, New York 10455. The execution of a search warrant found petitioner in possession of 408.6 cartons of untaxed cigarettes at petitioner's home address. This is the address to which the Notice of Determination, dated October 17, 2003, was sent. Taxpayer correspondence concerning this matter by petitioner's representative in 2004 and 2005 all bore references to the same address, and none corrected petitioner's address to reflect any other location. The Power of Attorney dated April 7, 2005 allowing Barbara Lew, Esq., to represent petitioner in this matter bore petitioner's address at the same Bronx location. The petition filed with the Division of Tax Appeals, received June 13, 2005, as filed by petitioner's representative, also contained the same Bronx address. The Division established it reasonably used petitioner's home address for the mailing of the notice in this matter.

E. Petitioner did not respond to the Division's motion for summary determination and she is deemed to therefore concede that no remaining questions of fact exist. However, assuming *arguendo* that petitioner's claim of nonreceipt of the notice of determination remains a question of fact, it is addressed at this juncture.

Both the petition and correspondence from petitioner's representative dated May 6, 2005 to the Division, indicate that "the statutory notice was returned *unclaimed* and is being held by John Walther of the Audit Division-Transaction and Transfer Tax Bureau." (Emphasis added.) As established, the Division has met its burden of showing how it determined the address (see Finding of Fact "4") and a presumption of receipt by petitioner has attached despite petitioner's statement of nonreceipt. Mail which is "unclaimed," for purposes of the Postal Service means that the "addressee abandoned or failed to call for [the] mail" (United States Postal Service Domestic Mail Manual § 507[1.4.1]. "Unclaimed" is distinguished from "undeliverable," which implies that an address is invalid, incomplete or illegible. The facts in this case support a strong likelihood that the notice remained unclaimed by petitioner in her deliberate attempt to avoid its receipt. Accordingly, it is determined that there is no factual issue concerning receipt of the notice that requires a hearing on the merits, and no further material issues of fact remain in the case.

F. The Division of Taxation's motion for summary determination is granted and the petition of Chintai Chinappen is hereby dismissed.

DATED: Troy, New York  
February 2, 2006

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE